130-334

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 199.

EDWIN F. KNOWLTON, INDIVIDUALLY AND AS EXECUTOR OF ELIJAH W. CARPENTER, DECEASED, PLAINTIFF IN ERROR,

vs.

THE CITY OF WATERTOWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED NOVEMBER 9, 1885.

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1 *Transcript of Record from Circuit Court of the United States for the Western District of Wisconsin.*

Supreme Court of the United States.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs in Error,

against

CITY OF WATERTOWN, Defendant in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the circuit court of the United States for the western district of Wisconsin, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court, before you, between Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually, plaintiffs, and The City of Watertown, defendant, a manifest error hath intervened, to the great damage of the said Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, in the District of Columbia, on the 12th day of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

3 The return of the judges of the circuit court of the United States for the western district of Wisconsin appears by the schedule hereto annexed.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Madison, in said district, this 15th day of October, A. D. 1885, and of our Independence the 110th.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

4 UNITED STATES OF AMERICA, } ss:
Western District of Wisconsin, }

At a special term of the circuit court of the United States for the western district of Wisconsin, begun and held, according to law, at the city of Madison, in said western district of Wisconsin, on the first Tuesday, being the 2d day, of December, A.D. 1884—present and presiding, the Honorable Romanzo Bunn, judge—among other the following proceedings were had, to wit:

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

against

CITY OF WATERTOWN, Defendant.

Be it remembered that heretofore, to wit, on the 9th day of January, A. D. 1878, came the plaintiffs above named, by Carpenter & Smiths, their attorneys, and filed their præcipe for a summons herein as follows, to wit:

Præcipe.

The Circuit Court of the United States for the Western District of Wisconsin.

ELIJAH W. CARPENTER and EDWIN F. KNOWLTON, Plaintiffs,

vs.

5 CITY OF WATERTOWN, Defendant.

The clerk will issue a summons for a money demand on contract, judgment in case of default to be two thousand five hundred and sixty dollars, with interest on eighty dollars from the first day of July, 1873, and with interest on eighty dollars from the first day of January, 1874, and with interest on eighty dollars from the first day of July, 1874, and with interest on eighty dollars from the first day of January, 1875, and with interest on eighty dollars from the first day of July, 1875, and with interest on eighty dollars from the first day of January, 1876, and with interest on eighty dollars from the 1st day of July, 1876, and with interest on two thousand and eighty dollars from the 1st day of January, 1877.

CARPENTER & SMITHS,
Plaintiffs' Attorneys.

Whereupon a summons issued as follows, to wit:

Summons.

In Circuit Court of the United States for the Western District of Wisconsin.

ELIJAH W. CARPENTER and EDWIN F. KNOWLTON

vs.

CITY OF WATERTOWN.

Summons for money demand.

The United States of America to the above-named defendant:

You are hereby summoned and required to answer the com-
6 plaint of the plaintiff in this action, which will be filed in the office of the clerk of this court, at Madison, in said district, and you are also required to file your answer thereto with the clerk of this court, at Madison, and also to serve a copy thereof on the attorneys of the plaintiffs, whose names are subscribed hereto, at their office, in Milwaukee, Wisconsin, within twenty days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the complaint as aforesaid the plaintiffs will take judgment against you for the sum of two thousand five hundred and sixty dollars, with interest on eighty dollars from the first day of July, 1873, and with interest on eighty dollars from the first day of January, 1874, and with interest on eighty dollars from the first day of July, 1874, and with interest on eighty dollars from the first day of January, 1875, and with interest on eighty dollars from the first day of July, 1875, and with interest on eighty dollars from the first day of January, 1876, and with interest on eighty dollars from the first day of July, 1876, and with interest on two thousand and eighty dollars from the first day of January, 1877, besides the costs of this action.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in said district, this 9th day of January, A. D. 1878, and of our Independence the 102nd.

[L. S.] F. M. STEWART, *Clerk.*

CARPENTER AND SMITHS,
Attorneys, Milwaukee, Wis.

7 The service whereof appears by the return of the marshal thereto endorsed thereon as follows, to wit:

Service.

Served on the within-named The City of Watertown by delivering to Wm. H. Rohr, last mayor of said city; Henry Bieber, city clerk; Chas. H. Gardner, city attorney, and Thomas Baxter, last presiding officer (or president or chairman) of the board of street

commissioners of said city of Watertown, each personally a copy of the within summons and by showing to each of them this original summons this Dec. 23, 1882.

F. W. OAKLEY, *U. S. M.*,
By W. S. MAIN, *Deputy.*

Fees:

Service	8
Copies	1 60
Travel	2 40
	12 00

And came Messrs. Finches, Lynde & Miller and filed the following consent to substitution of attorneys:

Substitution.

Circuit Court of the United States, Western District of Wisconsin.

E. W. CARPENTER *et al. vs.* CITY OF WATERTOWN.

We hereby consent that Finches, Lynde & Miller be substituted as attorneys in our place in above-entitled cause.

8 CARPENTER AND SMITHS,
Plaintiffs' Attorneys.

And thereafter and on the 19th day of June, A. D. 1883, came the above-named plaintiffs, by their attorneys, and filed their affidavit for order reviving suit as follows, to wit:

Affidavit.

STATE OF WISCONSIN, *Milwaukee County,* } *ss*:

Circuit Court of the United States, Western District of Wisconsin.

ELIJAH W. CARPENTER and EDWIN F. KNOWLTON, Plaintiffs,
vs.
CITY OF WATERTOWN, Defendant.

Benjamin K. Miller, being first duly sworn, deposes and says that the firm of Finches, Lynde & Miller are the attorneys for the plaintiffs in the above-entitled cause, and that he is a member of said firm and is the person who has had charge of the above-entitled cause.

That the above cause was commenced on the 9th day of January, 1878, and a summons on that day issued.

That on the 1st day of September, 1881, one of the above-named plaintiffs, to wit, Elijah W. Carpenter, departed this life, having first made his last will and testament, wherein he appointed said plaintiff, Edwin F. Knowlton, executor thereof.

9 That said last will and testament of Elijah W. Carpenter was duly proved and admitted to probate in the Kings county surrogate court, at Brooklyn, Kings county, State of New York, and letters testamentary therein granted to said Edwin F. Knowlton on the 16th day of November, 1881, and that heretofore, to wit, on the 13th day of December, A. D. 1881, a copy of the letters testamentary so granted to the plaintiff, duly authenticated, as required by law, was duly filed in the county court of Milwaukee county, State of Wisconsin, and that Edwin F. Knowlton is now acting as such executor.

That said Edwin F. Knowlton, as executor as aforesaid, is the successor in interest and to the interest of Elijah W. Carpenter, deceased.

That the cause of action upon which this suit is brought arises out of contract, express, and survive; that no pleadings have as yet been filed in this cause and the defendant has not appeared in this action.

Wherefore this deponent prays that the court make an order in this cause that the above cause be revived and continued in favor of Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually, as plaintiffs, and against The City of Watertown, as defendant, and that all proceedings hereafter in this suit be taken in the name of the suit as revived by this order, and that the duly verified supplemental complaint herewith tendered be ordered to be filed as the complaint in this action as revived and stand in lieu of any other complaint, and that the clerk of this court be ordered and authorized to deliver to the marshal the summons in this action as revived, to be served by him upon the defendant according to law.

B. K. MILLER.

10 Subscribed and sworn to before me this 19th day of June, A. D. 1883.

[SEAL.] GEO. P. MILLER,
Notary Public, Wisconsin.

Whereupon on the same day the following order reviving said suit was made and entered, to wit:

Order Reviving Suit.

Circuit Court of the United States, Western District of Wisconsin.

ELIJAH W. CARPENTER and EDWIN F. KNOWLTON, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

On all the records, papers, and proceedings on file herein and on the affidavit of Benjamin K. Miller, and a suggestion having been made on the record of the death of the plaintiff, Elijah W. Carpenter,

deceased, and it appearing to the satisfaction of the court that Edwin F. Knowlton has been legally and duly appointed executor of the last will and testament of Elijah W. Carpenter, deceased, and is now acting as such executor, and as such executor is the successor in interest of said Elijah W. Carpenter, and that the causes of action in the above-entitled cause arise out of contracts, express, and survive, and a supplemental complaint having been tendered:

Now, on motion of Finches, Lynde and Miller, no one appearing for the defendant—

It is ordered that the above-entitled cause be, and is hereby,
11 revived and continued in favor of Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually, as plaintiffs, and The City of Watertown, as defendant, and the supplemental complaint herein be, and is hereby, ordered to be filed as the complaint in this cause as revived, and all proceedings hereafter in this suit are hereby ordered to be taken in the name of the suit as revived by this order, and the clerk of this court is hereby ordered and authorized to deliver to the marshal the summons in this action as revived, to be served by him upon the defendant according to law.

Madison, June 19th, 1883.

By the court:

R. BUNN, *Judge.*

And came the marshal and made return of the summons herein as revived, as appears by the endorsement thereon as follows:

Service.

Served the within summons on The City of Watertown by delivering a copy thereof to Henry Bieber, city clerk, and also a copy thereof to Charles H. Gardner, city attorney, and a copy thereof to Fred. Kusel, the last elected chairman of the board of street commissioners of said city, this 26th day of June, 1883, the office of mayor of said city being vacant and there being no president of the common council nor presiding officer thereof in office.

F. W. OAKLEY, *U. S. M.*,
By W. S. MAIN, *Deputy.*

Fees:

Service	6 00
Copies	1 20
Travel	2 40
	$9 60

12 And on said 19th day of June, A. D. 1883, said plaintiffs filed their complaint as follows:

Complaint.

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament — Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

THE CITY OF WATERTOWN, Defendant.

The above named plaintiffs, by Finches, Lynde, Miller, their attorneys, plaintiffs above named, complaining of The City of Watertown, the above-named defendant, respectfully show to the court and allege in this their supplemental complaint as follows, to wit:

First. That the said plaintiffs *was* at all the times hereinafter mentioned and still are residents and citizens of the of Brooklyn, State of New York.

Second. That the above-named defendant, The City of Watertown, at the time of the issuing of the obligations hereinafter mentioned was, and ever since has been and now is, a corporation municipal, duly created and organized under and by virtue of the laws of the State of Wisconsin, and existing in said State and under the laws thereof, and that the same was by the laws of said State duly and fully authorized and empowered to issue the obligations hereinafter set forth and to bind itself thereby.

13 Third. That said defendant, The City of Watertown, on the first day of June, 1856, made, executed under seal, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

No. 133. UNITED STATES OF AMERICA. $1,000.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Watertown is justly indebted unto and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of Jan'y, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

14 This bond is one of a series of two hundred, of the same amount, tenor, and date, issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

In witness whereof the common council of the city of Watertown hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the common council of said city the first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*

Fourth. That said defendant, The City of Watertown, on the first day of June, 1856, made, executed under seal, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

No. 191. UNITED STATES OF AMERICA. $1,000.

STATE OF WISCONSIN, *City of Watertown.*

Issued to aid in the construction of the Watertown and Madison R. R.

Know all men by these presents that the City of Watertown is justly indebted unto and promises to pay Wm. B. Hibbard or bearer the sum of one thousand dollars on the first day of Jan'y, A. D. 1877, at the Bank of North America, in the city of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually on presentation and surrender of the annexed interest warrants or coupons at said bank. For the payment of principal and interest the faith and credit of said city of Watertown are inviolably and irrevocably pledged.

This bond is one of a series of two hundred of the same amount, tenor, and date issued in conformity with an act of the Legislative Assembly of Wisconsin and ordinances of the city of Watertown.

In witness whereof the common council of the city of Watertown hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the common council of said city this first day of June, A. D. 1856.

[Seal of the City of Watertown, Wisconsin.]

WM. CHAPPELL, *Mayor.*
SAM'L BAIRD, *Clerk.*

Fifth. That after the said bonds, with the coupons thereto annexed, had been issued in full conformity to law, and before the maturity thereof, the plaintiff, Edwin F. Knowlton, and one Elijah W. Carpenter (since deceased) purchased said above bonds, with such coupons annexed thereto as are hereinafter specifically set out, for value and became the lawful owners and holders thereof.

Sixth. That since the commencement of this suit, to wit, on the first day of September, A. D. 1881, said Elijah W. Carpenter died,

having first made his last will and testament, where- he appointed said plaintiff, Edwin F. Knowlton, executor thereof.

Seventh. That said last will and testament of Elijah W. Carpenter, deceased, was duly admitted to probate in the Kings county surrogate's court, at Brooklyn, Kings county, State of New York, and letters testamentary therein granted to said plaintiff, Edwin F. Knowlton, on the 16th day of November, 1881, and that prior to the revival of this suit, to wit, on the 13th day of December, 1881, a copy of the letters testamentary so granted to the plaintiff, duly authenticated, as required by law, *were* duly filed in the county court of Milwaukee county, in the State of Wisconsin, and that said Edwin F. Knowlton is now acting as such executor.

Eighth. That the plaintiffs are now the owners and holders of said bonds above described and of all the coupons hereinafter set out.

16 Said plaintiffs further allege, as a first cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1873, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1873, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as a 2nd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1874, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1874, which said plaintiffs claim and demand judgment therefor.

17 Said plaintiffs further allege, as a 3rd cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1874, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1874, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as a 4th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1875, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1875, which said plaintiffs claim and demand judgment therefor.

18 Said plaintiffs further allege, as a 5th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1875, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1875, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as a 6th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1876, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1876, which said plaintiffs claim and demand judgment therefor.

19 Said plaintiffs further allege, as a 7th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1876, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 191, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 191, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1876, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as an 8th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1873, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1873, which said plaintiffs claim and demand judgment therefor.

20 Said plaintiffs further allege, as a 9th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1874, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1874, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as a 10th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1874, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1874, which said plaintiffs claim and demand judgment therefor.

21 Said plaintiffs further allege, as an 11th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1875, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1875, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as a 12th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1875, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1875, which said plaintiffs claim and demand judgment therefor.

22 Said plaintiffs further allege, as a 13th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of January, 1876, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1876, which said plaintiffs claim and demand judgment therefor.

Said plaintiffs further allege, as a 14th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, The City of Watertown, on the first day of June, A. D. 1856, made, executed, issued, and delivered, in full conformity to law, its certain written obligation or promise to pay, which, before delivery, was signed by its mayor and by its clerk, and was in the words and figures as follows, to wit:

$40.00. The City of Watertown will pay to the holder hereof forty dollars on the first day of July, 1876, at the Bank of North America, in the city of New York, on presentation hereof, being the interest due that day on bond of city, No. 133, issued to aid the Watertown and Madison railroad.

WM. CHAPPELL, *Mayor.*
S. BAIRD, *Clerk.*

That the said obligation above set forth is an interest warrant or coupon annexed to bond No. 133, above more specifically set forth; that the plaintiffs are the lawful owners and holders of said coupon; that defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of forty dollars, with interest thereupon, at seven per cent. per annum, from the first day of July, 1876, which said plaintiffs claim and demand judgment therefor.

23 Said plaintiffs further allege, as a 15th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, on about the first day of June, 1856, made and executed, under its corporate seal, signed by its mayor and countersigned by its clerk, its negotiable bond, No. 191, bearing date on that day, wherein and whereby, for value received, it promised to pay to Wm. B. Hibbard or bearer one thousand dollars, at the Bank of North America, in the city of New York, on the first day of January, 1877, together with interest thereon, at the rate of 8 per ct. per annum, payable semi-annually on presentation of the interest warrants or coupons thereto annexed.

That a true copy of said bond No. 191 is above set out in full.

That said bond was, at about the date thereof, delivered by said defendant to the payee therein named, and the same was afterwards and before the maturity thereof sold for value, by said payee, in the money market of the country, and that said bond was afterwards sold and delivered by the bearer and owner thereof to the plaintiffs, who are now its lawful owners and holders; that said defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of one thousand dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1877, which said plaintiffs claim and demand judgment therefor.

24 Said plaintiffs further allege, as a 16th cause of action against said defendant, The City of Watertown, as follows, to wit:

That said defendant, on or about the first day of June, 1856, made and executed, under its corporate seal, signed by its mayor and countersigned by its clerk, its negotiable bond, No. 133, bearing date on that day, wherein and whereby, for value received, it promised to pay to Wm. B. Hibbard or bearer one thousand dollars, at the Bank of North America, in the city of New York, on the first day

of January, 1877, together with interest thereon, at the rate of 8 per ct. per annum, payable semi-annually on presentation of the interest warrants or coupons thereto annexed.

That a true copy of said bond No. 133 is above set out in full.

That said bond was, at about the date thereof, delivered by said defendant to the payee therein named, and the same was afterwards and before the maturity thereof sold for value, by said payee, in the money market of the country, and that said bond was afterwards sold and delivered by the bearer and owner thereof to the plaintiffs, who are now its lawful owners and holders; that said defendant has not paid the same, and that there is now due to the plaintiffs thereon from the defendant the sum of one thousand dollars, with interest thereupon, at seven per cent. per annum, from the first day of January, 1877, which said plaintiffs claim and demand judgment therefor.

25 Wherefore said plaintiffs demand judgment against said defendant, The City of Watertown, as follows, to wit:

For $40, with interest at 7 per ct. from July 1st, 1873.
" " " Jan'y " 1874.
" " " July " 1874.
" " " Jan'y " 1875.
" " " July " 1875.
" " " Jan'y " 1876.
" " " July " 1876.
For $40, with interest at 7 per ct. from July 1st, 1873.
" " " Jan'y " 1874.
" " " July " 1874.
" " " Jan'y " 1875.
" " " July " 1875.
" " " Jan'y " 1876.
" " " July " 1876.
For $1,000, with interest at 7 per ct. from Jan'y 1st, 1877.
" " " Jan'y " 1877.

And for the costs and disbursements of the plaintiffs in this action incurred.

FINCHES, LYNDE & MILLER,
Plaintiffs' Attorneys.

26 STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Benjamin K. Miller, being first duly sworn, deposes and says that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge; that he is the attorney of the plaintiffs and makes this verification on their behalf; that the above-entitled action is an action founded on written instruments for the payment of money only, and that such instruments are in the possession of this deponent; that all the allegations of the complaint are within the personal knowledge of this deponent; that the above complaint is not verified by the plaintiffs or by either

of them for the reasons that they and each of them are non-residents and are not now within the State of Wisconsin, and because all the allegations of the complaint are within the personal knowledge of this deponent; that the knowledge of this deponent is derived from the laws of Wisconsin, from the written instruments upon which this suit is brought, and from personal communications received by him from the plaintiffs whilst acting as their attorney.

B. K. MILLER.

Subscribed and sworn to before me this 19th day of June, A. D. 1883.

[NOTARIAL SEAL.] GEO. P. MILLER,
Notary Public, Milwaukee County, Wis.

27 And thereafter came the said defendant, by George W. Bird and Daniel Hall, its attorneys, and filed notice of appearance herein as follows, viz:

Appearance.

Circuit Court of the United States for the Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

against

CITY OF WATERTOWN, Defendant.

Please take notice that we are retained by and appear for the defendant, The City of Watertown, in the above-entitled action, and we demand that a copy of the plaintiffs' complaint therein be served upon us, at the office of Hall & Skinner, in the 4th ward of the city of Watertown, Jefferson Co., Wis.

Yours, &c.,
GEO. W. BIRD,
DANIEL HALL,
Attorneys for Defendant.

P. O. address, Watertown, Wis.

To Mess. Finches, Lynde & Miller, plaintiffs' attorneys.

Endorsed: Due service of the within notice and demand admitted this 16th day of July, A. D. 1883. Finches, Lynde & Miller, plaintiffs' attorneys.

28 And thereafter came the plaintiffs' attorneys and filed proof of service of complaint as follows:

Service of Complaint.

United States Circuit Court, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

Due and personal service of a copy of the verified supplemental complaint in the above-entitled action admitted this 21st day of July, A. D. 1883.

GEO. W. BIRD,
DANIEL HALL,
Defendant's Attorneys.

And on the 11th day of August, A. D. 1883, came the defendant and filed its answer as follows, to wit:

Answer.

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

29 THE CITY OF WATERTOWN, Defendant.

The City of Watertown, the defendant in the above-entitled action, answering the supplemental complaint of the plaintiffs in said action, by its attorneys, George W. Bird and Daniel Hall, alleges and shows to the court—

First. For a first defense to said action and to each and every cause of action stated in said complaint, the defendant denies that it has any knowledge or information sufficient to form a belief as to whether the bonds mentioned in said complaint were or any or either of them was, before maturity or at any other time, sold for value or otherwise by the payee therein named or by any one else in the money markets of the country, or as to whether the said bonds were or any or either of them was afterwards or at any time sold and delivered by the bearer or owner thereof to said Elijah W. Carpenter and Edwin F. Knowlton or to either of them, or as to whether the said Elijah W. Carpenter and Edwin F. Knowlton or either of them ever purchased the said bonds or any or either of them or the interest warrants or coupons mentioned and set out in said complaint or any or either of said interest warrants or coupons, or as to whether the plaintiffs are or ever have been the owners or

holders of said bonds or any or either of them or of said interest warrants or coupons or any or either of them, or as to whether the said Elijah W. Carpenter died on the 1st day of September, 1881, or since the commencement of this action, or as to whether he died leaving a last will and testament wherein he appointed the said Edwin F. Knowlton the executor thereof, or as to whether the said will was admitted to probate or letters testamentary granted
30 to said Knowlton, or as to whether a copy of such letters *were* filed in the county court of Milwaukee county, in the State of Wisconsin, or as to whether the said Edwin F. Knowlton is or ever was executor or acting executor of said Elijah W. Carpenter's last will and testament.

Second. For a second defense to said action and to each and every cause of action stated in said complaint, the said defendant further alleges that said several causes of action stated in said complaint did not nor did any or either of them accrue within six years before the commencement of this action, and that none of the causes of action stated in said complaint accrued within six years before the commencement of the said action, and that this action was not commenced before the month of June, 1883, nor within the six years after the same accrued limited by law for the commencement thereof, and was and is barred by the statute of limitations of the State of Wisconsin.

That as to all the bonds, interest warrants, and coupons described and set forth in said complaint and as to each and every one of said bonds, interest warrants, and coupons the defendant saith and avers that said several causes of action did not, any of them, accrue within the six years next before the commencement of this action; that this action was not commenced before the month of June, A. D. 1883, within the meaning, terms, or provisions of any law of the State of Wisconsin which limits the time for the commencement of an action, and that action on said bonds and on each and every one of them and on each and every one of said interest warrants and coupons was and is barred by the statute of limitations of the State of Wisconsin.

31 Wherefore the defendant demands judgment dismissing said action and for costs therein.

GEO. W. BIRD,
DANIEL HALL,
Defendant's Attorneys.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Henry Bieber, being duly sworn, deposes and says that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. This deponent further says that the reason why the verification is not made by the defendant is that defendant is a corporation; that deponent is an officer of the same, to wit, that he is the city clerk of said defendant, The City of Watertown, and that his knowledge is derived from the laws of the State of Wisconsin

and documents in his possession as such city clerk, and that the grounds of his belief aforesaid are such laws and documents and information communicated to him by the officers and agents of said corporation.

HENRY BIEBER.

Subscribed and sworn to before me this 7th day of August, A. D. 1883.

C. B. SKINNER,
U. S. Court Commissioner for West'n Dist. of Wisconsin.

And thereafter and on the 21st day of August, A. D. 1883, came the said plaintiffs and filed their amended complaint as follows, to wit:

Amended Complaint.

32 Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON, Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

Now come the above-named plaintiffs, by Finches, Lynde & Miller, their attorneys, and amend, as of course, their complaint heretofore served and filed in the above-entitled cause by making the following additions thereto, to wit:

First. After paragraph eight of said complaint add the following allegations:

Said plaintiffs allege, on information and belief, that the said defendant, The City of Watertown, and the officers, agents, residents, and citizens of said city did, subsequent to the 1st day of March, A. D. 1873, conspire together and with each other, and ever since have conspired together and with each other, for the purpose and with the preconceived intent and design to defraud these plaintiffs and all other owners and holders of the bonds and coupons to such bonds issued by said city and to prevent these plaintiffs and the other owners of said bonds and coupons from obtaining the service of process on said city.

Said plaintiffs further allege, upon information and belief, that each year since the 1st day of March, 1873, a mayor of said city was elected, as required by law, but said mayor each year, with the intent and design as aforesaid, qualified as hereinafter men-
33 tioned and immediately thereafter placed his resignation in the hands of the city clerk of said city, to be filed by him in case of emergency and to take effect accordingly.

Said plaintiffs further allege, upon information and belief, that each year since the 1st day of March, 1873, after the mayor and members

of the common council had been duly elected, they and each of them failed to qualify until they had assembled together in a secret place with locked doors, unknown to the people at large and to these plaintiffs, and with persons on watch to inform them of the approach of any person or persons, and then and there, if unmolested, the mayor and members of the common council, qualified as required by law, transacted for said defendant city certain necessary business and thereafter immediately filed with the city clerk of said city their respective resignations, to take effect immediately, and which resignations went immediately into effect.

Said plaintiffs further allege that since the 1st day of March, 1873, they have employed attorneys and agents for the purpose of ascertaining who was the mayor or acting mayor or chairman of the common council or chairman of the board of street commissioners and for the purpose of having process served on said city; but owing to said conspiracy, as these plaintiffs are informed and believe, since said 1st day of March, A. D. 1873, there has been no mayor of said city, except each year for a few hours at such secret and concealed meetings, and the common council of said city, with the said fraudulent intent and design, has failed each year to elect a chairman of said common council, and since said last-mentioned date there has been no person who was acting mayor and no chairman of the board of street commissioners.

34 Said plaintiffs further allege that on the 9th day of January, 1878, the said plaintiffs in the above-entitled action filed a præcipe for a summons and an undertaking for costs, and a summons was issued in due conformity to law and placed in the hands of the United States marshal for service, and said marshal, on account of said conspiracy, was not able to ascertain who was mayor or city clerk of said city or who the persons were upon whom process could be served for said city, and on that account was not able to serve said summons and did not serve the same.

Said plaintiffs further allege that, notwithstanding they have used due diligence and hired attorneys and agents for the purpose of having process served on said city, they have been unable to this date to serve or have served the summons in this action on the mayor of said city or on that person who by law should exercise the functions of mayor of said city.

FINCHES, LYNDE & MILLER,
Plaintiffs' Attorneys.

STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Benjamin K. Miller, being first duly sworn, deposes and says that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein alleged on information and belief, and as to those matters he believes it to be true; that he is the attorney of the plaintiffs and makes this verification on their behalf; that the above-entitled action is an action founded upon written instruments for the payment of money only, and that such instruments are in the

35 possession of this deponent; that all the allegations of the amended complaint are within the personal knowledge of this deponent, except those alleged on information and belief; that the above amended complaint is not verified by the plaintiffs or by either of them for the reason that they and each of them are non-residents and are not now within the State of Wisconsin, and because all the allegations of the amended complaint are within the personal knowledge of the deponent, except such as are made on information and belief; that the knowledge of this deponent is derived from the laws of Wisconsin, from the written instruments upon which this suit is brought, and from personal communications received by him from the plaintiffs whilst acting as their attorney, and the grounds of his belief are derived from information from the United States marshal for the western district of Wisconsin, E. Mariner, and other persons who have attempted to serve process on the city of Watertown.

B. K. MILLER.

Subscribed and sworn to before me this 18th day of August, A. D. 1883.

[SEAL.] GEO. P. MILLER,
Notary Public, Milwaukee Co., Wis.

And said plaintiffs also, on the same day, filed proof of service of said amended complaint as follows, viz:

Service.

United States Circuit Court, Western District of Wisconsin.

36 EDWIN F. KNOWLTON, Executor, &c., *et al.*
vs.
CITY OF WATERTOWN.

Personal service of a copy of amended complaint in above cause admitted.

August 20, 1883.

GEO. W. BIRD,
D. HALL,
Defendant's Att'ys.

And afterwards, to wit, on the 1st day of November, A. D. 1883, came the parties and filed the following stipulation:

Stipulation.

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

It is hereby stipulated by and between the said parties that said

defendant may answer the plaintiffs' additions and amendments to their complaint served in said action or any part thereof by general or specific averments or denials or any or all of them, as it may choose, and that such answer thereto, together with defendant's former answer to plaintiffs' said complaint, heretofore served and now on file in said action, shall both stand and together be said
37 defendant's answer to the whole of said plaintiffs' complaint as added to and amended as aforesaid.

Dated October 26th, 1883.

FINCHES, LYNDE & MILLER,
Pl'ffs' Att'ys.
GEO. W. BIRD & D. HALL,
Def't's Att'ys.

Endorsed: Due service of the answer to the within-named additions and amendments pursuant to this stipulation is admitted this 26th day of October, 1883. Finches, Lynde & Miller, pl'ffs' att'ys.

And on said 1st day of November, A. D. 1883, came the defendant and filed answer to amended complaint as follows:

Answer.

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

The answer of the above-named defendant to the amendments and additions made by the plaintiffs to their complaint first served in the above-entitled action, by D. Hall & G. W. Bird, its attorneys, respectfully shows unto this honorable court—

38 First. That the said defendant has no knowledge or information sufficient to form a belief as to whether the said plaintiffs, since the 1st day of March, 1873, or at any other time or times, have employed attorneys and agents or either for the purpose of ascertaining who was the mayor or acting mayor or chairman of the common council or chairman of the board of street commissioners for the purpose of having process served on said city, or as to whether said plaintiffs made the attempt to commence suit against said city on the 9th day of February, 1878, with the result alleged in said complaint, but the defendant admits that each year since the first day of March, 1873, a mayor of said city has been duly elected.

Second. That, except the averments above answered, the said defendant denies each and every allegation in said amendments and additions to said complaint contained.

Third. The said defendant insists upon all the defenses to said action heretofore stated, interposed, and set up in its answer to said complaint in said action, which last-named answer has been heretofore served and is now on file in said action, the same as if said last-named answer and defenses were now repeated here.

GEO. W. BIRD AND D. HALL,
Def't's Att'ys.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Henry Bieber, being duly sworn, deposes and says that he has heard read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

39 This deponent further says the reason why the verification is not made by the defendant is that the defendant is a corporation; that this deponent is an officer of the same, to wit, that he is the city clerk of the said defendant, City of Watertown, and that his knowledge is derived from the laws of Wisconsin, documents in his possession as such city clerk, and his own observation, and that the grounds of his belief are such laws, documents, and observation and information communicated to him by the officers and agents of said city.

HENRY BIEBER.

Subscribed and sworn to before me this 24th day of October, A. D. 1883.

C. B. SKINNER,
U. S. Court Commissioner for Western Dist. of Wis.

And thereupon came the said plaintiffs and filed their demurrer as follows:

Demurrer.

United States Circuit Court, Western District of Wisconsin.

EDWIN F. KNOWLTON, Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

THE CITY OF WATERTOWN, Defendant.

Now come the above-named plaintiffs, by Finches, Lynde and Miller, their attorneys, and demur to the second defense in

40 the defendant's answer contained, to wit, to the defense of the statute of limitations, for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a defense.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiffs.

And thereafter and on the 16th day of January, A. D. 1884, came the defendants and filed its amended answer as follows, viz:

Amended Answer.

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

The City of Watertown, the defendant above-named, by its attorneys, George W. Bird and Daniel Hall, answering the amended complaint herein by this its amended answer, respectfully shows to the court—

First. That the said defendant denies each and every allegation in the said amended complaint contained except so much and such parts thereof as are hereinafter expressly admitted to be true or otherwise specifically answered.

Second. This defendant admits the residence and citizenship of the parties, the corporate character and authority of the defendant, the execution and non-payment by it of the bonds and coupons
41 as is alleged in the amended complaint, and that a mayor of said city has been elected each year since March 1st, 1873.

Third. But this defendant denies that it has any knowledge or information sufficient to form a belief as to whether the bonds mentioned in said amended complaint were or any or either of them was, before maturity or at any other time, sold for value or otherwise, by the payee therein named or by any one else, in the money markets of the country or elsewhere, or as to whether the said bonds were or any or either of them was afterwards or at any other time sold or delivered by the bearer or owner thereof to the said Elijah W. Carpenter and Edwin F. Knowlton or to either of them, or as to whether the said Elijah W. Carpenter and Edwin F. Knowlton or either of them ever purchased the said bonds or either of them or the interest warrants and coupons mentioned and set out in said amended complaint or any or either of said interest warrants or coupons, or as to whether the plaintiffs are or ever have been the owners or holders of said bonds or either of them or of said interest warrants or coupons or of any or either of them, or as to whether the said Elijah W. Carpenter died on the 1st day of September, 1881, or as to whether he died leaving a last will and testament and appointed the said Edwin F. Knowlton executor thereof, or as to whether his said will was admitted to probate or letters testamentary granted to said Knowlton, or as to whether a copy of such alleged letters was filed in the county court of Milwaukee county, Wisconsin, or as to whether said Knowlton is or ever has been executor or acting as executor of said Carpenter's last will and testament,

42 or as to whether the plaintiffs have employed attorneys or agents for the purpose of ascertaining who was the mayor or acting mayor or chairman of the common council or chairman of the board of street commissioners or for the purpose of having process served on said city.

Fourth. This defendant, further answering, alleges that said action was commenced on or about and not before the 19th day of June, A. D. 1883, when a summons, wherein the said plaintiffs were named plaintiffs and this defendant was named defendant, first issued out of said court in the above-entitled action, and was thereupon and thereafter delivered to the marshal of said district to be served on this defendant, and that on or about the 26th day of June, 1883, the said marshal made the delivery of the copies of the said summons, which he returned thereon endorsed and which is now on file in said action; and on the 16th day of July, 1883, this defendant duly appeared herein and fully submitted itself to the jurisdiction of said court in said above-entitled action from and after the date last aforesaid; and this defendant denies that the above-entitled action was commenced or was pending in said court before the said 19th day of June, 1883; and, upon information and belief, it denies that the above-named plaintiffs ever used any diligence to commence the said action before said 19th day of June, 1883; and this defendant, further answering, denies that on or about the 9th day of January, 1878, the above-named plaintiffs in the above-named action filed a præcipe for a summons and an undertaking for costs, or that a summons was issued therein or placed in the hands of the United States marshal for service, as in the said amended complaint is alleged; but this defendant alleges, upon information and belief, that the said Elijah W. Carpenter was

43 then, during all that time, living, and had no last will and testament nor executor thereof.

Fifth. And this the said defendant, for a further and separate defense, which it will insist on herein to said action and cause of action and to the whole thereof and to each and every cause of action stated in said amended complaint, avers and alleges that neither the said action nor any of the causes of action averred or set forth in said amended complaint accrued within the six years next before said 19th day of June, A. D. 1883, nor on or since the day and year last aforesaid, and that on or after and not before said 19th day of June, 1883, the summons herein against this defendant, wherein the said Edwin F. Knowlton as executor of the last will and testament of Elijah A. Carpenter, deceased, and Edwin F. Knowlton individually are the plaintiffs named, and by which summons the above-entitled action has been commenced, was first delivered to the United States marshal for service and to be served on this defendant, and that the same summons never was nor had been delivered to such marshal nor to any officer or person for service or to be served on this defendant or otherwise before said 19th day of June, 1883, and that neither the said action nor any of the causes of action in the said amended complaint stated nor any part thereof accrued within six years before the commencement of the above-entitled ac-

tion, and that the said action was not commenced before the said 19th day of June, 1883, nor was it commenced within the six years limited by law for the commencement thereof after the same accrued and is barred by the statute of limitations of the State of Wisconsin; that as to all the bonds, interest warrants, and coupons described in said amended complaint the said defendant saith
44 and avers that each and all of said several causes of action in said amended complaint stated did not nor did any or either of them accrue thereon within the six years next before the commencement of said action, and that the said action and the whole thereof is barred by the statute of limitations of the State of Wisconsin.

GEO. W. BIRD AND DANIEL HALL,
Def't's Att'ys.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Henry Bieber, being duly sworn, says that he has heard the foregoing amended answer read and knows its contents, and that the same *are* true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by defendant is that defendant is a corporation; that deponent is an officer of the same, to wit, city clerk thereof, and that his knowledge is derived from the laws of Wisconsin and documents in his possession as such clerk, and that the grounds of his belief are such laws and documents and information communicated to him by the officers and agents of said defendant.

HENRY BIEBER.

Subscribed and sworn to this 28th day of December, 1883, before me—

C. B. SKINNER,
U. S. Court Commissioner for Western Dist. of Wisconsin.

And thereafter and on the 8th day of January, A. D. 1884, came the plaintiffs and filed demurrer as follows:

45 *Demurrer.*

United States Circuit Court, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

Now come the above-named plaintiffs, by Finches, Lynde and Miller, their attorneys, and demur to the defense in the defendant's amended answer contained, to wit, to the defense of the statute of

limitations, for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a defense.

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiffs.

And in the record of proceedings aforesaid in said entitled cause, on the 27th day of August, A. D. 1884, appears the following entry, to wit:

Order Overruling Demurrer.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. KNOWLTON Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

46 It is ordered that the demurrer to the plea of the statute of limitations set up in defendant's amended answer to amended complaint herein be, and the same is hereby, overruled.

It is further ordered that the plaintiff- be, and hereby *is*, allowed twenty days in which to file such new or further pleading as — are or may be advised would be proper, and that in default thereof judgment may go for the defendant.

And afterwards, to wit, on the 2d day of December, A. D. 1884, came said defendant, by its attorneys, and filed affidavit of default as follows, viz:

Affidavit of Default.

WESTERN DISTRICT OF WISCONSIN, *ss:*

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON, Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

George W. Bird, being duly sworn, deposes and says that he is one of the attorneys for the defendant in the above-entitled action; that on the 26th day of August, 1884, the plaintiffs' demurrer to the defendant's plea of the statute of limitations herein was overruled by this court and the plaintiffs allowed twenty days in which to
47 file such new or further pleadings as they might be advised would be proper and in default thereof judgment was to go for the defendant; that no new or further pleading has been filed herein or served upon the said defendant's attorneys or either of them, except an amended complaint was served on defendant's attorneys on the 11th day of September, 1884, and withdrawn by

plaintiffs on the 15th day of September, 1884, and the said plaintiffs are now in default herein for not filing or serving a new or further pleading herein.

GEO. W. BIRD.

Subscribed and sworn to this 13th day of November, 1884, before me—

R. B. KIRKLAND,
Notary Public, Jefferson Co., Wis.

And also filed the following notice of application for judgment, to wit:

Notice of Application.

Circuit Court of the United States, Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

To Messrs. Finches, Lynde & Miller, plaintiffs' attorneys.

48 GENTLEMEN: Please to take notice that upon the foregoing affidavit and the papers, pleadings, and proceedings on file herein and upon the records, books, and files herein of the clerk of this court we shall apply to said court, at the United States court-room, in the city of Madison, Wisconsin, on the 2d day of December, 1884, at the opening of court on that day, or as soon thereafter as counsel can be heard, for judgment in favor of the defendant and against the plaintiffs herein.

Yours, &c., GEO. W. BIRD AND D. HALL,
Def't's Att'ys.

Dated November 14, 1884.

Endorsed: Due service of the within notice and affidavit admitted this 19th day of November, 1884. Finches, Lynde & Miller, pl'ffs' att'ys.

And on said 2d day of December, of the December term, A. D. 1884, of said court, in the record of proceedings aforesaid appears the following order, to wit:

Judgment.

Circuit Court of the United States for the Western District of Wisconsin.

EDWIN F. KNOWLTON as Executor of the Last Will and Testa-
49 ment of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs,

vs.

CITY OF WATERTOWN, Defendant.

A copy of the summons in the above-entitled action having been delivered by the marshal on the 26th day of June, 1883, to the city clerk, city attorney, and the last elected chairman of the board of street commissioners of said defendant city; and the defendant having, on the 16th day of July, 1883, served on plaintiffs' attorneys a written notice of appearance and demand of a copy of the complaint, and having then and thereby duly appeared by its attorneys, Geo. W. Bird and Daniel Hall; and the plaintiffs having thereafter duly served and filed their complaint, and the defendant having thereafter duly served and filed its answer, pleading, among other things, that this action was not commenced within the six years limited therefor by the statute of limitations of the State of Wisconsin, and is barred by said statute; and the said plaintiffs having thereafter duly served and filed an amendment of their said complaint, wherein they allege certain facts in avoidance of the defendant's said plea of the statute of limitations; and the defendant having thereafter duly served and filed its amended answer to plaintiffs' complaint as thus amended, wherein defendant pleads, among other things, that this action was not commenced within the six years limited therefor by the statute of limitations of the State of Wisconsin, and is therefore barred by said statute; and the plaintiffs having thereafter duly served and filed their demurrer to the defend-
ant's said plea of the statute of limitations contained in
50 said amended answer, on the ground that said plea did not state facts sufficient to constitute a defense; and the issue thus joined by said demurrer having been duly brought on to trial at the June term of this court for the year 1884, and having then been tried by the court without a jury; and the court having then found and decided said issue in favor of the defendant, and having overruled plaintiffs' said demurrer and allowed them twenty days in which to file such new or further pleading as they might be advised would be proper, and in default thereof ordered judgment to go for the defendant; and the defendant having, on the 19th day of December, 1884, duly served on plaintiffs' attorneys notice of application for judgment, together with an affidavit showing that no new or further pleading had been filed by the plaintiffs; and the said application having duly come on to be heard on the first day of the December term, 1884, of this court, to wit, on the 2d day of Decem-

ber, 1884, and no one appearing to oppose the same; and it appearing that no new or further pleading has been filed by the plaintiffs, and that the defendant is entitled to judgment herein upon the said issue of law:

Now, therefore, on motion of George W. Bird and Daniel Hall, attorneys for the defendant, it is adjudged that this action was not commenced within the six years limited by law for the commencement thereof, and is barred by the statute of limitations of the State of Wisconsin.

And it is further adjudged that the plaintiffs take nothing by this action, and that the defendant go thereof without day, and that the defendant, The City of Watertown, do have and recover of the plaintiffs, Edwin F. Knowlton as executor of the last will and tes-
51 tament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually, the sum of forty-five dollars and fifty cents, its costs and disbursements of this action as duly taxed, and that it have execution therefor.

Dated Madison, Wis., this 2d day of December, A. D. 1884.

By the court.

Judgment-roll signed December 2, 1884.

F. M. STEWART, *Clerk.*

And afterwards, to wit, on the 13th day of October, A. D. 1885, came the said plaintiffs and filed security on writ of error as follows, to wit:

Security on Writ of Error.

52 Supreme Court of the United States.

EDWIN F. KNOWLTON as Executor of the Last Will and Testament of Elijah W. Carpenter, Deceased, and Edwin F. Knowlton Individually, Plaintiffs in Error,

vs.

CITY OF WATERTOWN, Defendant in Error.

Know all men by these presents that we, Benjamin K. Miller and William H. Miller, are held and firmly bound unto the City of Watertown in the full and just sum of five hundred dollars, to be paid to the said City of Watertown, its successors or assigns; to which payment, well and truly to be made and done, we do bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of October, A. D. 1885.

Whereas the above-named Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered

in the above-entitled action by the circuit court of the United States for the western district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the said Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually shall prosecute their said writ of error to effect and an-
53 swer all damages and costs that may be assessed against them if they shall fail to make good their said plea, then this obligation to be void; otherwise valid.

B. K. MILLER. [SEAL.]
W. H. MILLER. [SEAL.]

54 UNITED STATES OF AMERICA, *ss:*

To the City of Watertown, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America to be holden at Washington, in the District of Columbia, on the second Monday, being the 12th day, of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Wisconsin, wherein Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton individually are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in said district, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

R. BUNN,
Dist. Judge.

I accept service of above citation this 15th day of October, 1885.

GEO. W. BIRD & DANIEL HALL,
Attorneys for Defendant, The City of Watertown.

55 UNITED STATES OF AMERICA, } *ss:*
Western District of Wisconsin, }

I, F. M. Stewart, clerk of the district court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now in my custody, and they are true copies of their respective originals and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office, and also the original writ of error, citation, and security in said case.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Madison, in the said

western district of Wisconsin, this 12th day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the said United States the one hundred and tenth.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART, *Clerk.*

Endorsed on cover: W. Wisconsin C. C. U. S. No. 199. Edwin F. Knowlton, individually and as executor of Elijah W. Carpenter, deceased, plaintiff in error, *vs.* The City of Watertown. Filed November 9, 1885.

FILED,
JAN 15 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of United States.

OCTOBER TERM, 1888.

No. 199.

EDWIN F. KNOWLTON, INDIVIDUALLY, AND AS EXECUTOR OF ELIJAH W. CARPENTER, DECEASED,
Plaintiff in Error,

vs.

THE CITY OF WATERTOWN,
Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

GEO. W. BIRD,
DANIEL HALL.
Atty's for Deft. in Error.

DEMOCRAT PRINTING COMPANY, PRINTERS, MADISON, WIS.

Supreme Court of United States.

OCTOBER TERM, 1888.

No. 199.

EDWIN F. KNOWLTON, INDIVIDUALLY, AND AS EXECUTOR OF ELIJAH W. CARPENTER, DECEASED,

Plaintiff in Error,

vs.

THE CITY OF WATERTOWN,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

On the 9th day of January, 1878, the praecipe for the summons in the case of Elijah W. Carpenter and Edwin F. Knowlton, plaintiffs, against the City of Watertown, defendant, was filed and a summons in that case issued.

On the 23d day of December, 1882, the marshall delivered a copy of that summons "to William H. Rohr, last mayor of said city, Henry Bieber, city clerk, Charles H. Gardner, city attorney, and Thomas Baxter, last presiding officer, or president or chairman of the board of street commissioners of said city."

On the 19th day of June, 1883, the affidavit of one of the attorneys of plaintiffs was filed showing that on the first day of September, 1881, Elijah W. Carpenter, one of the plaintiffs, died testate; that his will was duly admitted to probate and letters testamentary granted to Edwin F. Knowlton, November 16, 1881, and a copy of the letters,

duly authenticated, was filed in the county court of Milwaukee county, Wisconsin, December 13, 1881. It is further stated in the affidavit "that no pleadings have, as yet, been filed in this cause and the defendant has not appeared in this action."

The prayer of the affidavit is for an order reviving and continuing the cause in favor of Edwin F. Knowlton, as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edward F. Knowlton, individually, as plaintiffs, and against the city of Watertown as defendant; and, among other things, "that the clerk of this court be ordered and authorized to deliver to the marshal the summons in this action, as revived, to be served by him upon the defendant according to law."

On the same day the court entered an order continuing the action as prayed, and ordering the clerk to deliver "to the marshal the summons in this action, as revived, to be served by him upon the defendant according to law."

The complaint was also filed on the 19th of June, 1883, the substance of which will presently be given.

On the 26th of June the marshal delivered to certain city officers copies of the summons wherein the parties appear as follows: "Edwin F. Knowlton, as executor of the last will and testament — Elijah W. Carpenter, deceased, and Edwin F. Knowlton, individually, plaintiffs, against the City of Watertown, defendant." Pages 2 to 6 of record.

On the 16th day of July, 1883, the defendant duly appeared and demanded a copy of the complaint which was served on defendant's attorneys July 21, 1883. Pages 18 and 19 of the record. The complaint contains 16 causes of action; 14 of which are upon 14 coupons of $40 each, attached to two bonds issued by the city, June 1st, 1856, to aid in the construction of the Watertown & Madison Railroad, and the other two are upon the two bonds. The first of the 14 coupons became due July 1st, 1873, and the last July 1st, 1876; and the two bonds became due each of them January 1st, 1877.

The defendand's answer, duly filed and served August

11, 1883 (pages 19 to 20 of record) pleads as a second defense the six years' statute of limitations of Wisconsin, and that this action was not commenced before the month of June, A. D. 1883.

On the 21st of August, 1883, plaintiffs filed an amendment to their complaint, wherein certain allegations are made on information and belief to avoid the plea of the statute of limitations. The amendment contains:

First: A general allegation that since March 1, 1873, defendant, its officers, agents, citizens and residents, have conspired together for the purpose and with the preconceived intent and design to defraud the plaintiffs and all other owners of its bonds and coupons, and to prevent the plaintiffs and such other owners from obtaining the service of process.

Second: The specific allegation that each year since March 1st, 1873, a mayor of said city has been duly elected but, with such intent and design, said mayor each year qualified and immediately thereafter placed his resignation in the hands of the city clerk, to be filed by him in case of emergency, and to take effect accordingly.

Third: That the mayor and aldermen, each year since March 1, 1873, failed to qualify until they had assembled together in a secret place, with locked doors, unknown to the people at large and to plaintiffs, and with persons to watch to inform them of the approach of any person or persons, and then and there, if unmolested, duly qualified, transacted certain necessary business for the defendant, and immediately thereafter filed with the city clerk their resignations which took effect immediately.

Fourth: That since March 1, 1873, plaintiffs have employed attorneys and agents for the purpose of ascertaining who was the mayor, acting mayor, chairman of the council, or chairman of the board of street commissioners, and for the purpose of having process served on said city, but owing to said conspiracy since March 1, 1873, there has been no mayor, except each year for a few hours, at such secret and concealed meetings, and the common council,

with such fraudulent intent and design, has failed each year to elect a chairman of said common council, and since March 1, 1873, there has been no person who was acting mayor, and no chairman of the board of street commissioners.

Fifth: That notwithstanding that plaintiffs have due diligence and have hired attorneys and agents for the purpose of having process served on defendant, they have been unable to serve or have served the summons in this action on the mayor of said city, or on that person who by law should exercise the functions of mayor of said city. (Pages 6 to 7 of record.)

Sixth: That January 9, 1878, plaintiffs filed praecipe for summons and undertaking for costs, and summons was issued, placed in marshal's hands, and the marshal, on account of said conspiracy, was unable to ascertain who was mayor or city clerk, or the persons upon whom process should be served, and, on that account, was unable to, and did not, serve the summons.

On the 1st of November, 1883, defendant filed its amended answer, denying the allegations of the amendment to the complaint. (Page 24.) And thereupon plaintiffs demurred "to the defense of the statute of limitations for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a defense." (Page 25.)

Thereafter, and within the time allowed by law therefor, the defendant filed and served its amended answer to the amended complaint. (Pages 26 to 28 of record.) In this amended answer it is, among other things, alleged that the action was commenced on or about, and not before, the 19th day of June, 1883, when a summons wherein the present plaintiffs were named plaintiffs and the defendant was named defendant, was issued and was afterwards delivered to the marshal to serve, who, June 26th, 1883, delivered copies thereof to certain city officials, and on the 16th of July, 1883, the defendant duly appeared and submitted itself to the jurisdiction of the court. And defendant denies that the action was commenced or pending before June 19th,

1883, and further, that neither of the causes of action averred in the amended complaint accrued within the six years next before June 19th, 1883, nor within six years before the commencement of the action.

The plaintiffs seasonably demurred "to the defense of the statute of limitations for the reason that it appears upon the face thereof that it does not state facts sufficient to constitute a defense." (Pages 28 and 29.)

On the 27th of August, 1884, the demurrer was overruled and the plaintiffs allowed 20 days in which to file a new or further pleading as they might be advised and in default thereof judgment to go for the defendant. (Page 29.)

No further pleading being filed judgment was entered in favor of the defendant (pages 30 to 32), to review which judgment the writ of error herein is taken.

ARGUMENT.

The fourteen causes of action on the coupons accrued on or before July 1, 1876, and not later, and the two on the bonds accrued January 1, 1877, and not later; and were all barred by the statutes of limitations, the former, on or before July 2, 1882, and the latter, January 2, 1883, unless either the action was commenced before those dates, or, the facts stated in the amended complaint prevent the running of the statute.

Only two questions then are presented by the record, to wit: 1. When was the action commenced — before or after the six years? 2. Do the facts stated in the amended complaint prevent the running of the statute?

I.

The action was commenced within the meaning of the statute of limitations not earlier than the 16th day of July, 1883, when defendant appeared in the action.

1. The action of Elijah W. Carpenter and Edwin F. Knowlton against the City of Watertown was never commenced or pending.

On the 9th day of January, 1878, a præcipe for summons was filed and summons issued in that action, but on the 1st day of September, 1881, Mr. Carpenter, one of the plaintiffs, died. Up to that time there had been no service or attempted service of the summons. The death before the service of the summons ended the action and all proceedings in it. It had the same effect, so far as defendant is concerned, as if it had occurred before the summons had been delivered to the marshal, or before it had issued. It prevented the contemplated action being commenced at all. Everything up to the service of the summons is merely preparation for the commencement of the action. If one of the parties dies during that preparation the action cannot be commenced.

2. The summons issued January 9, 1878, was never served. This is apparent from the following:

(a) In the amended complaint, filed August 21, 1883, it is alleged that the marshal "on account of said conspiracy was not able to serve said summons and did not serve the same," page 22. This allegation places the fact, that this summons was never served, beyond controversy.

(b) The attempted service on the 23d day of December, 1882, was absolutely void. At that time Mr. Carpenter, one of the plaintiffs in that summons, was dead, having died September 1, 1881. His death temporarily abated that action, even if by any latitude of construction it could have been considered as pending, and no step could be taken in it

before its revival, much less so important a step as the service of process.

Downer v. Howard, 44 Wis., 82.
Guenther v. Jacobs, 44 Wis., 354.
Supervisors of La Pointe v. O'Malley, 47 Wis., 332.
Reed v. Butler, 11 Abb. (N. Y.), 128.
Scranton v. Baxter, 3 Sandf., 660.

(c) This attempted service was void also because no copy of the summons was delivered to the mayor. On this point we simply invite attention to our brief in *Amy et al. v. The City of Watertown*, No. 196, on this calendar, without repeating the argument.

3. The order entered June 19th, 1883, assuming to revive the case of *Carpenter and Knowlton* against *The City of Watertown*, was wholly inoperative so far as reviving that case was concerned.

The summons issued in 1878 was never served, so the court never acquired jurisdiction to entertain the motion or proceeding to revive. Section 2629, Wis. R. S. of 1878, provides: "A civil action in a court of record shall be commenced by the service of summons. From the time of such service, or the issuance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings." Clearly the court had no jurisdiction to revive the action, even if it attempted to do so.

In *Auerbach et al. v. Maynard*, 26 Minn., 421, October 28, 1878, a summons was issued in the action and delivered to the sheriff of the county where defendant last resided, with intent that it should be actually served. At the same time a writ of attachment was allowed in the action, under which the sheriff seized defendant's property. Defendant being a non-resident of the state, publication of the summons was ordered and was commenced on November 7, 1878, and was continued for six weeks. Defendant died November 18, 1878. *Held*, That the service of the summons not being completed at the time of defendant's death, the court had no jurisdiction to proceed further in the action,

and, therefore, no authority to order the action to be revived and continued against defendant's executors.

An attempt to commence an action under (Minn. St., corresponding to Sec. 4240, Wis. R. S.), is equivalant to a commencement by service of summons, when the attempt is within sixty days followed by service of the summons. Sections 13 and 14 of the Minnesota statute are the same as sections 4239 and 4240, R. S. of Wis. The court say: " Our construction of section 14 is, that the attempt to commence an action there spoken of is equivalent to the commencement mentioned in Sec. 13, *i. e.*, to a commencement by service of summons, when such attempt is, within sixty days, followed by a first publication of a summons, which is published for six consecutive weeks, as provided in section 65. If it does not mean this, it can only mean that the action may be sufficiently commenced without the five publications other than the first, which is manifestly absurd. At the expiration of the six weeks' publication, and not before, the service is complete, as section 65 declares. Then, under section 69, from the time the servise is thus completed, 'the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings.' If the party upon whom the service is being made dies before it is complete, that is, before the required publications have all been made, the service can not be completed, there being no person in being upon whom to make it, and whatever has been done short of complete service, is of no avail, and the court acquires no jurisdiction through it. "

The whole object and purpose of a revival is to keep alive a *pending* suit. If no suit be pending, there is nothing to revive, nothing for a revival to operate on. A suit is pending only from the time of the service of process or the appearance of the defendant. If death occurs prior to that time, there can be no revival; but an original suit must be commenced. Whether we are correct in this proposition or not, it is very clear that under section 4240, R. S., mere delivery of the summons to the

officer, with the intent to have it served, is not sufficient to constitute the commencement of the action, within the meaning of the statute of limitations; but the delivery must be followed by the service within sixty days, to be of any avail.

Auerbach et al. v. Maynard, supra.
Monnell's Practice, 302.

4. The summons delivered by the clerk to the marshal, June 19, 1883, or soon after, must be regarded (as it is) as an original summons issued in a new and distinct action.

The revival order (so called) ordered the clerk "to deliver to the marshal the summons in this action as revived, to be served by him upon the defendant according to law." Page 6. Pursuant to this direction, the clerk, on June 19, 1883, or soon after, delivered to the marshal to be served a summons of some kind, just what, the printed records fails to disclose. But it was the same as the one printed on page 3, except the title was, "*Edwin F. Knowlton as executor of the last will and testament of Elijah W. Carpenter, deceased, and Edwin F. Knowlton, Individually, vs. City of Waterton*," and the signature of the attorneys was, "Finches, Lynde & Miller, Plff's Attorneys, 102 Wisconsin street, Milwaukee, Wis." It does not purport to be, nor does it any where indicate, that it is an alias summons, or one issued in a revived action. On the contrary it purports to be, as it is, an original summons issued in an original action, and such it should be held to be.

5. On the 26th day of June, 1883, copies of this summons were delivered by the marshal to the city clerk, city attorney, and last elected chairman of the board of street commissioners, and on the 16th day of July, 1883, the defendant duly appeared. That service being insufficient as we have before argued, this case can be regarded as commenced only from July 16, 1883, the date of defendant's appearance.

6. In the amended complaint (page 22) it is alleged that on January 9, 1878, "the said plaintiffs in the above entitled action" filed a praecipe for a summons, and an undertak-

ing for costs, and a summons was issued and placed in the hands of the marshal for service.

In the amended answer and the defense demurred to (p. 27), it is alleged that this action "was commenced on or about, and not before, the 19th day of June, A. D. 1883," when a summons therein was first issued and delivered by the marshal to be served, and copies were delivered to him June 26, 1883, to the officers named in his return, and defendant appeared July 16, 1883.

The demurrer to this defense admits these allegations.

3 *Com. Bank v. Buckner*, 20 How., 108.

Arnold v. United States, 9 Cranch, 104.

So that the conceded facts are that this action was not commenced before June 19, 1883.

7. Regarding this action as a continuance of that wherein the summons was issued January 9, 1878, it was commenced, within the meaning of the statute of limitations of Wisconsin, not earlier than June 26th, 1883.

(a) The statutes of Wisconsin on the subject are sections 4239, and 4240, as follows:

Section 4239: "An action shall be deemed commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant when the summons is served on him, or on a co-defendant who is a joint contractor or otherwise united in interest with him."

Section 4240: "An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of any provision of law, which limits the time for the commencement of an action, when the summons is delivered with the intent that it shall be actually served to the sheriff or other proper officer of the county in which the defendants, or one of them, usually or last resided; or if a corporation organized under the laws of this state be defendant, to the sheriff or the proper officer of the county in which it was established by law, or where its general business is transacted, or where it keeps an office for the trans-

action of business, or wherein any officer, attorney, agent or other person upon whom the summons may by law be served, resides or has his office; or if such corporation has no such place of business or any officer or other person upon whom the summons may by law be served, known to the plaintiff, or if such defendant be a non-resident, or a non-resident corporation, to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons, or the service thereof within sixty days. If the action be in a court not of record, the service thereof must be made with due diligence."

The section first above quoted provides "an action shall be deemed commenced * * * as to each defendant, when the summons shall be served on him." This is a precise and definite general rule provided by the statute to determine when an action shall be deemed commenced within the meaning of the statute of limitations. And to determine that it is only necessary to ascertain when the summons was served.

The following section provides one and only one exception to this general rule, and that is, "an attempt to commence an action shall be deemed equivalent to the commencement thereof * * provided such an attempt be followed * * by the service of the summons within sixty days." Thus an attempt to commence the action followed by actual service within sixty days, will be equivalent to the commencement of the action. It requires, however, both the attempt and the service within sixty days to amount to the commencement of the action. The attempt without the service within sixty days is not sufficient.

Burgett v. Strickland, Adm'r, 32 Hun., 264.
Shaw v. Cock, 878 N. Y., 194.
Sherry et al. v. Gilmore et al., 58 Wis., 324.
Auerbach et al. v. Maynard, 26 Minn., 421.

Here the attempt to serve was not followed by service within sixty days, and, therefore, this action cannot be deemed to have been commenced in 1878.

When, then, is this action to be deemed to have been commenced, within the meaning of the statute of limitations? We reply, on the 16th day of July, 1883, when defendant appeared in the action. Then, and only then, did the court acquire jurisdiction of the defendant, and the action cannot be regarded as commenced, until the court acquires such jurisdiction. The appearance did not relate back to the attempted service, June 26, 1883, because that attempt at service was no service, and no case was pending against defendant until it voluntarily appeared July 16, 1883. The principle governing parties brought in, and new causes of action set up, by amendment, apply here. Though an action be duly commenced by the due service of process, yet if an additional party be subsequently brought in, or a new cause of action inserted, the action can be regarded commenced as to such party or cause of action, only from the time the amendment was made.

Shaw v. Cock, 78 N. Y., 194.
Miller's Heirs v. McIntyre, 6 Pet., 61.
Mohr v. Lewis, 69 Ala., 180.
Johnston v. Dist. Columbia, 1 Mackey, 427.
Miller v. McIntyre, 1 McLean, 85.
Hawthorne v. State, 57 Ind., 286.

In *Etheridge v. Woodley*, 83 N. C., 11, a summons was issued and returned without service before the bar. After the bar and one or more regular terms of the court, an alias summons was issued and served, and defendant appeared and plead the statute. Held, the bar applied, and that the issuance and service of the alias, did not make the commencement of the action relate back to the issuance of the unserved original summons, and that defendant's appearance put him in court only from its date and had no anterior force upon the action.

This action, then, was not commenced until July 16, 1883, the date of defendant's appearance.

II.

The facts stated in the amended complaint do not prevent the running of the statute of limitations.

Those facts are substantially the same as the facts alleged in *Amy et al. v. The City of Watertown*, No. 197, for like purpose, and we beg leave to refer to our brief in that case without repeating the argument here.

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